No. 83-810

IN THE

Supreme Court of the United States

IN RE:

NATHAN YORKE, TRUSTEE IN BANKRUPTCY, THE SEEBURG CORPORATION,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

WAREHOUSE, MAIL ORDER, OFFICE, PROFESSIONAL AND TECHNICAL EMPLOYEES UNION LOCAL 743, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Intervening-Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONER'S REPLY TO THE BRIEFS OF THE NATIONAL LABOR RELATIONS BOARD AND INTERVENOR

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A.

The Board and the Union unite in avoiding the substance of Petitioner's position with abstractions and obscuration.[1] If either had the candor to admit it, this case is about the funds now held in the bankruptcy court for the benefit of creditors and the claims of the union to these funds. In both briefs, truth is the victim of zeal.

The Union's claim is bottomed in a premise alien to the framework of the Bankruptcy Act which does not permit payment to those who have toiled not, nor spun, nor otherwise given value to the estate. The framework of the Bankruptcy Act does not provide for payments of the penal nature here attempted to be assessed.

If, in fact, the case is about those funds then the command to make a limited payment therefrom and to bargain about the remainder does create a conflict situation for the Trustee whose duty is to the creditors of the estate. This conflict was resolved here in terms solely of the Board's fiat. The Board rightfully attempts to mask its claim by burying it in a footnote (page 9) saying that the liability "has been established *** in strict conformity with bankruptcy law." All that was established was that the price of approval of a plan of liquidation was the sequestration of a fund to cover a meretricious claim.

B.

The Board defends its remedial order (Reply p. 10) as a vindication of the "public policy of the statute by making the employees whole for losses suffered on account of an unfair

[1] The suggestions as bargaining topics in both briefs with reference to "severance pay, reinstatement rights, seniority in the event of recall" (Union Reply p. 6) and "severance pay, payments into a pension fund, preferential hiring at an employer's other locations, and provision of reference letters" (Board Reply p. 8) are not vindicated anywhere in this record. No reference letters were ever requested.

labor practice," *Nathanson* v. *National Labor Relations Board,* 344 U. S. 25, 27 (1952) and restoration of the parties to a *status quo ante, National Labor Relations Board* v. *J. H. Rutter-Rex Mfg. Co.,* 396 U. S. 258; *Phelps Dodge Corp.* v. *National Labor Relations Board,* 313 U. S. 177 (1945); and *National Labor Relations Board* v. *Mastro Plastics Company,* 354 F. 2d 170 (2d Cir. 1965), cert. denied, 384 U. S. 972 (1966). A Latin quote is appropriate for a dead enterprise but is singularly inapplicable where, as here, the Court has found that the Trustee had every right under these circumstances to close the plant. Whatever merit the remedy may have where the closing itself was wrongful or secretive, it has no merit here where the Court found the closing proper and that the Trustee had no duty under the circumstances he found to notify and bargain with the Union. No *status quo ante* to which the policy could apply is present here.

C.

The Board and the Union apparently concede that if the amended complaint did not adequately apprise the Trustee of just what he was charged with then the Trustee has been denied due process. Both take the position that the Trustee was notified by the amended complaint. Both present a bob-tailed version of the charges in that complaint.

Even rhetoric should be held to some ethical standard. A minimal regard for such criteria condemns the calculated omission which, in this context, totally misrepresents the charges of the amended complaint. The omission speaks eloquently of the merits of their positions.

The Union (Reply p. 6) begins its quotation from the amended complaint in mid-sentence, "without prior notice to the Union and without having afforded the Union an opportunity to negotiate and bargain concerning the effect of said conduct." The Board's quote also starts out in mid-air, "without

having afforded the Union an opportunity to negotiate and bargain, concerning the effect of said conduct." (Reply p. 12). The full context is as follows:

> "(a) On or about February 8, 1980, Respondents terminated operations at its facility in Chicago, Illinois and discharged its employees.
>
> (b) Respondents engaged in the acts and conduct described above in paragraph XI(a) without prior notice to the Union and without having afforded the Union an opportunity to negotiate and bargain concerning the effect of said conduct."

The Trustee was, of course, charged with a specific violation on a specific day, i.e., terminating its operation on or about February 8, 1980, and discharging its employees. The Administrative Law Judge, in her formal findings and the Board in its turn simply repeated this. (A 35). The Trustee was not charged with a failure to bargain in the wake of the closing at a subsequent time. Her gratuitous inclusion of another refusal to bargain in her narrative was a bulwark to the specific finding, not an additional conviction of illegal conduct. If so treated, it was in violation of her ruling that subsequent events would only go to the remedy with respect to the specific alleged charge. The Union insists that the "issues" were litigated. The lick and brush treatment of evidence going only to the remedy which counsel believed was inappropriate hardly qualifies as the type of issue resolution conforming with due process. The Trustee has been ill-treated in this regard. Finally, the pettifogging suggestion, that this issue is raised here for the first time and, so, should be disregarded, makes the Trustee's point. The only issue litigated and argued was whether or not on February 8, 1980, an unfair labor practice was committed. *Only after* the Court of Appeals absolution of the Trustee on that offense and *only after* that Court contrived to find another unfair labor practice could and did this become an issue.

CONCLUSION

Simply being "had" is not among the considerations governing this Court's review on certiorari unless it is within the broad scope of this Court's Rule 17.1.(a). The Trustee was "had" here and, thereby, the creditors of the estate. Certiorari should be granted to redress the wrong.

Respectfully submitted,

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